90-922

NO.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners

v.

AARON S. LIFCHEZ, et. al.,

Respondents

Petition Of Appellants/Proposed Intervenors For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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APPENDIX TO CERTIORARI PETITION

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

September 10, 1990

No. 90-2208 - Judge Ann Claire Williams

BEFORE:
Honorable John L. Coffey, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

AARON LIFCHEZ, individually and on behalf of all others similarly situated, Plaintiff - Appellee

NEIL F. HARTIGAN and RICHARD M. DALEY,
Defendants

and

ANDREW D. SCHOLBERG, as Expectant Father and Next Friend of BABY SCHOLBERG, who fairly and adequately represents the class of unborn babies of the State of Illinois, presently conceived or to be conceived in the future,
Proposed Intervenor - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came before the Court for decision on the record from the above mentioned district court.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX B

IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 14, 1990
Decided September 10, 1990.

No. 82 C 4324 - Judge Ann Claire Williams

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

AARON LIFCHEZ, *et al .*,

Plaintiffs

No. 90-2208 v

NEIL F. HARTIGAN and CECIL PARTEE,

Defendants

UNPUBLISHED OPINION AND ORDER

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The district judge enjoined the operation of Ill. Rev. Stat. ch. 38 ¶81-26 §6 (7) on the ground that it is unconstitutionally vague. Neil F. Hartigan, the Attorney General of Illinois, and Cecil Partee, the State's Attorney of Cook County, the defendants, decided not to take an appeal. Four days before the expiration of the period within which to appeal, Andrew D. Scholberg attempted to intervene for the purpose of taking an appeal. The district judge denied the petition for intervention, and Scholberg has appealed.

The original plaintiffs ask us to dismiss the appeal on the ground that Scholberg lacks standing. Although this is one of the two grounds on which the district judge denied the motion to intervene (the other is that Scholberg could not establish that the Attorney General and State's Attorney are inadequate representatives of the state's interests), it is not an obstacle to appellate jurisdiction. *Whether* Scholberg is a proper party is a subject that he is entitled to litigate. If he is not, the appropriate disposition is an order affirming the decision refusing to allow Scholberg to intervene.

Although the plaintiffs do not expressly ask for summary affirmance, their motion and Scholberg's response present all of the arguments necessary to decision on that question, and it is appropriate to stop this case short of full briefs. As *Diamond v. Charles,* 476 U.S. 54 (1986), a closely analogous case, holds, the defense of Illinois statutes is entrusted to the State's Attorneys and Attorney General of Illinois. Citizens of Illinois disappointed by public officials' litigation decisions have their say at the ballot box; they may not act as if *they* were the Attorney General or State's Attorney.

The district judge was correct to hold that Scholberg lacks standing, whether in his own name or as next friend of his unborn child. Scholberg is not a subject of this law. His interest, such as it is, lies in inducing the Attorney General and State's Attorney to bring prosecutions to enforce the law. For many years it has been understood that private citizens lack standing to compel enforcement of the criminal law. *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973); *Leeke* v. *Timmerman,* 454 U.S. 83 (1981); *Allen v. Wright,* 468 U.S. 737 (1984).

Affirmed

APPENDIX C

(Entered July 19, 1990)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, IL 60604

AARON LIFCHEZ, etc.,

Plaintiff-Appellee,

v.

NEIL F. HARTIGAN & RICHARD M. DALEY

Defendants,

and

ANDREW D. SCHOLBERG, etc.,

Proposed Intervenor-Appellant.

No. 82 C 4324 - Judge Ann Claire Williams

REQUEST OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR JURISDICTIONAL MEMO

Appellant filed a notice of appeal on May 29, 1990 from the district court's final order entered on April 27, 1990 and from the district court's order entered May 29. 1990 denying appellant leave to intervene. The appeal from the district court's April 27, 1990 order appears to be untimely, however, because the notice was filed in the district court 31 days after entry of final judgment, one date late. See Federal Rule of Appellate Procedure 4(a) (1); *Romasanta v. United airlines, Inc.*, 537 F.2d 915, 919 (7th Cir. 1976), aff'd sub nom *United Airlines, Inc., v. McDonald*, 432 U.S. 385 (1977).

See generally 9 Moore's Federal Practice Sec. 203.06 at p. 3-20 (2d ed. 1990). Accordingly, appellant is directed to file a memorandum discussing why this appeal should not be dismissed as to the April 27, 1990 order. This statement shall be filed on or before July 30, 1990. Briefing in this appeal will continue to be held in abeyance pending resolution of jurisdictional issues. A motion to dismiss the appeal from that order pursuant to Rule 42(b) will satisfy this requirement.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

AARON LIFCHEZ, et al.,

Plaintiffs

v.

NEIL F. HARTIGAN & RICHARD M. DALEY,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that ANDREW D. SCHOLBERG, the proposed intervenor, as Expectant Father and Next Friend of BABY SCHOLBERG, who fairly and adequately represents the class of unborn babies of the State of Illinois, presently conceived or to be conceived in the future, hereby appeals both on behalf of BABY SCHOLBERG and on behalf of the class of the unborn babies of the State of Illinois, presently conceived or to be conceived in the future, to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 26th day of April, 1990, and the MINUTE ORDER dated and entered in this action on the 24th day of May, 1990.

Respectfully submitted,

Lawrence J. Joyce

APPENDIX E

September 24, 1990

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324

AARON LIFCHEZ, et. al.,

Plaintiff

v.

NEIL HARTIGAN, et. al.,

Respondant

Petition to intervene to maintain class action and to file notice of appeal is denied for the reasons stated in open court.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	May 24, 1990
	)	9:30 a.m.
Defendants	)	Motion

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES

For the Plaintiff:	MR. HARVEY M. GROSSMAN, Legal Director, Roger Baldwin Foundation of ACLU 20 East Jackson Boulevard, Suite 1600 Chicago, Illinois 60604
For Neil F. Hartigan:	MS. KATHLEEN K. FLAHAVEN, Assistant Attorney General 100 West Randolph Street, 13th Floor Chicago, Illinois 60601
For Richard M. Daley	MR. HAROLD E. McKEE III, Assistant States Attorney 500 Daley Center Chicago, Illinois 60602
Petitioner:	MR. LAWRENCE J. JOYCE 6203 North Keeler Avenue

Chicago, Illinois 60646
Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street, Room 1928
Chicago, Illinois 60604
(312) 435-6891

THE CLERK: 82 C 4324 Lifchez versus Hartigan on a motion.

MS. FLAHAVEN: Good morning, Your Honor. Kathleen Flahaven, assistant attorney general, on behalf of Attorney General Hartigan.

MR. JOYCE: Good morning, Your Honor. Larry Joyce on behalf of the movant Baby Scholberg as represented by Andrew Scholberg.

MR. GROSSMAN: Good morning, Your Honor. Harvey Grossman on behalf of the plaintiffs. If I might approach the bench, Your Honor, I'd like to file a motion for leave to appear. Miss Connell, who has represented the plaintiff from my office, is on a parental leave.

THE COURT: All right. I'm prepared to rule on the motion to intervene, but I have a long call, so I'm going to call this at the end of the call and I'll rule.

MR. GROSSMAN: Thank you.

THE COURT: All right.

(Whereupon, other cases were called and heard.)

THE CLERK: 82 C 4324, Lifchez versus Hartigan on motion, recall.

MR. JOYCE: Larry Joyce representing Baby Scholberg as represented by Andrew Scholberg.

MR. GROSSMAN: Harvey Grossman on behalf of the plaintiffs, Your Honor.

MS. FLAHAVEN: Kathleen Flahaven, assistant attorney general, on behalf of Attorney General Hartigan.

MR. MC KEE: Harold McKee, assistant state's attorney, on behalf of State's Attorney Partee.

THE COURT: All right. With respect to the motion to intervene, that motion is denied. Federal Rule of Civil Procedure 24, which allows for intervention, was not designed to allow everyone who has a theoretical beef with a court order to intrude in the action. While it is true that Courts will occasionally allow intervention even after judgment for purposes of taking an appeal, the proposed intervenor must have standing. He must have some interest which would be impaired if intervention is denied. The proposed intervenor here has not such interest. He has not alleged that he is about to be experimented upon, which was the provision in the statute at issue in the Court's April 26th opinion. The proposed intervenor's only interest heard, as far as I can discern from the brief, is to complain about this Court's opinion on the irrelevant ground of Section 1 of the Illinois abortion law and state cases on the tort of wrongful birth. If the proposed intervenor had taken the trouble to read the opinion of April 26th and to read it carefully, he would have realized that the statutory provision being challenged was Section 6, subsection 7, not Section 1. The Attorney General and the state's attorney adequately represented the interests of the state in enforcing the statute. The proposed intervenor has no interest here, and the motion to intervene is therefore denied.

MR. JOYCE: May I address the Court concerning the issues?

THE COURT: Well, you've made your position clear int he brief. I have ruled. You can have about a minute because I have to proceed on other matters.

MR JOYCE: We just wish to state for the record that we raise an issue of nonjoinder of indispensible parties, the prenatal humans. The statute is not vague. The burden of showing the adequacy of representation under Federal Rule 24 is not on the party seeking to intervene, and the authority in the Seventh Circuit must be reexamined in light of the Supreme Court's decision in Martin v. Wilkes. We allege that the opinion in Roe versus Wade and of this Court inadvertently effectively overruled the 5th, 13th and 14th Amendments. We also wish to challenge the subject matter jurisdiciton of the Court. Roe versus Wade and the opinion of this Court, with due regard to the sensitivities of this Court, inadvertently overruled the Dred Scott decision to the extent that it would allow a person to have rights under state law.

THE COURT: Certainly you've made your record. I think it's a very bizarre reading of the Court's opinion. All I did was hold that the experimental statue was vague and it was difficult for doctors to discern what type of treatment or experimentation could be done on a pregnant mother and the effect it might have on the fetus. It doesn't even bring into question any of the statues that you raise. Nor does it really even comment on the validity of the abortiuon statute or not. It doesn't have anyting to do with that. At any rate, I've ruled. Motion to intervene is denied.

MR. GROSSMAN: Your Honor, for the record might I add just two or three things --

THE COURT: Yes.

MR. GROSSMAN: -- in response to these comments? The petitioner, the movant did not comply with Rule 24. There is no pleading attached to his motion. We could not have responded to these papers as they presently stood because of that deficiency. While he sought to purport to represent the class in this case, he never complied with Rule 24. There is no allegations

defining the class and meeting the requirements of Rule 23B. In addition to that, two decisions that have already been decided here in the circuit would preclude his participation, Diamond versus Charles in the United States Supreme Court and Keith versus Daley in the Seventh Circuit. And we would like to bring those to the Court's attention.

THE COURT: All right. Thank you, counsel.

MS. FLAHAVEN: Thank you, Your Honor.

APPENDIX G

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

No: 82 C 4324

AARON LIFCHEZ, et al.,

v.

NEIL F. HARTIGAN
RICHARD M. DALEY,

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and A decision has been rendered.

IT IS ORDERED AND ADJUDGED

that summary judgment is entered in favor of the plaintiff class of physicians represented by DR. AARON LIFCHEZ and against defendants NEIL F. HARTIGAN and RICHARD M. DALEY; that Section 6(7) of the Illinois Abortion Law is unconstitutional and the defendants are permanently enjoined from enforcing it.

APRIL 26, 1990 — *Date*

H. STUART CUNNINGHAM — *Clerk*

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

AARON LIFCHEZ, et al.,

Plaintiffs,

v.

NEIL F. HARTIGAN and RICHARD M. DALEY,

Defendants.

MEMORANDUM OPINION AND ORDER

Dr. Lifchez represents a class of plaintiff physicians who specialize in reproductive endocrinology and fertility counselling. Physicians with these medical specialties treat infertile couples who wish to conceive a child. Dr. Lifchez is suing the Illinois Attorney General and the Cook County State's Attorney, seeking a declaratory judgment that a provision of the Illinois Abortion Law is unconstitutional. He also seeks a permanent injunction against the defendants from enforcing the statute. The provision at issue concerns fetal experimentation. Ill.Rev.Stat., Ch. 38 ¶ 81-26, § 6(7) (1989). Both sides move for summary judgment, alleging that there are no disputed facts and that each side is entitled to judgment as a matter of law. The court finds that § 6(7) of the Illinois Abortion Law violates the Constitution in two ways: (1) it offends Fourteenth Amendment principles of due process by being so vague that persons such as Dr. Lifchez

cannot know whether or not their medical practice may run afoul of the statute's criminal sanctions, and (2) the statute impinges upon a woman's right of privacy and reproductive freedom as established in Roe v. Wade, 410 U.S. 113 (1973), Carey v. Population Services International, 431 U.S. 678 (1977), and their progeny. The court therefore declares § 6(7) of the Illinois Abortion Law to be unconstitutional and permanently enjoins the defendants from enforcing it.

VAGUENESS [1]

Section 6(7) of the Illinois Abortion Law provides as follows:

> (7) No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

Ill.Rev.Stat., Ch. 38 ¶ 81-26, § 6(7) (1989). Dr. Lifchez claims that the Illinois legislature's failure to define the

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1.) Defendant Hartigan makes a belated abstention argument in his Response Brief in Opposition to Plaintiff's Motion for Summary Judgment at 11. As Dr. Lifchez points out, this is a curious litigation strategy for a party who has himself moved for summary judgment on the exact same issues presented by Dr. Lifchez' motion. The court declines to abstain. Abstention is appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" Bellotti v. Baird, 428 U.S. 132, 147 (1976). The costs of abstention in terms of delay and expense are often substantial. Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973). Those costs are not justified when the challenged statute cannot reasonably be construed to avoid interfering with a woman's reproductive privacy rights under Roe v. Wade and Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 441-42 (1983). The costs of abstention are even less justified when the challenged statute is so vague that it violates Fourteenth Amendment due process. Colautti v. Franklin, 439 U.S. 379, 392 n.9 (1979).

terms "experimentation" and "therapeutic" renders the statute vague, thus violating his due process rights under the Fourteenth Amendment. The court agrees.

Vague laws - especially criminal laws - violate due process in three ways. First, they fail to give adequate notice of precisely what conduct is being prohibited. Without such notice, it is impossible for people to regulate their conduct within legal bounds. Smith v. Goguen, 415 U.S. 566, 572 n.8 (1974) (statute holding criminally liable anyone who "treats contemptuously" the United States flag held to be unconstitutionally vague, citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939): "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning.") The second problem with vague statutes is that, by failing to explicitly define what conduct is unlawful, they invite arbitrary and discriminatory enforcement by the police, judges, and juries. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (Court held unconstitutionally vague a vagrancy statute outlawing "'rogues. . . vagabonds. . . common night walkers. . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers..."). See also Smith v. Goguen, 415 U.S. at 575 (commenting on the lack of a clear standard in phrase "treats contemptuously" for flag statute, Court said "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.")

Last, vague standards of unlawful conduct, coupled with the prospect of arbitrary enforcement, will inevitably cause people to "steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked." Grayned v. Rockford, 408 U.S. at 109. This is an especially dangerous consequence of vague statutes that encroach

upon constitutional rights. Colautti v. Franklin, 439 U.S. 379, 391 (1979) (held unconstitutionally vague an abortion law requiring persons performing abortions to preserve life of fetus if it could be determined that the fetus 'is viable or if there is sufficient reason to believe that the fetus may be viable..."). See also Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (although upholding drug paraphernalia ordinance against a vagueness attack, Court warned that perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); Smith v. Goguen, 415 U.S. at 573 ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.") It is a fundamental principle of due process that persons "'of common intelligence" not be forced to guess at the meaning of the criminal law.'" Id. at 574.

A. Experiment or Routine Test?

The Illinois legislature's failure to define "experimentation" and "therapeutic" in § 6(7) means that persons of common intelligence will be forced to guess at whether or not their conduct is unlawful. As Dr. Lifchez points out in his briefs, there is no single accepted definition of "experimentation" in the scientific and medical communities. Dr. Lifchez identifies four referents for the term. One meaning of experiment is pure research, where there is no direct benefit to the subject being experimented on, and the only goal of the research is to increase the researcher's knowledge. Plaintiff's Brief in Support of Summary Judgment at 7. This definition describes the defendants' "Orwellian nightmare" of laying out fetuses in a laboratory and exposing them to various harmful agents "just for the scientific thrill" of it. Defendant Hartigan's Reply Brief in Support of Summary Judgment at 3. A second meaning of experiment includes any procedure that has not yet been sufficiently tested so that the outcome

is predictable, or a procedure that departs from present-day practice. This is the kind of definition adhered to by insurance companies, which often deny coverage for procedures whose effectiveness is not generally recognized. Plaintiff's Brief in Support of Summary Judgment at 8. Dr. Lifchez also cites to the definition of experiment by the American Fertility Society, which includes as "experimental"- even standard techniques when those techniques are performed by a practitioner or clinic for the first time. Id. at 8-9. Finally, any medical therapy where the practitioner applies what he learns from one patient to another, could be described as an "experiment." Id. at 9. See, e.g., Margaret S. v. Edwards, 794 F.2d 994, 999 (5th Cir. 1986) (medical treatment can be described as both a test and an experiment "whenever the results of the treatment are observed, recorded, and introduced into the data base that one or more physicians use in seeking better therapeutic methods.) This definition of experiment is in line with that apparently contemplated by the federal regulations on protection of human research subjects: "'Research' means a systematic investigation designed to develop or contribute to generalizable knowledge." 45 C.F.R. § 46.102(e) (1989)

The legislative history of § 6(7) is unenlightening as far as nailing down a particularized meaning of "experiment" to counter the vagueness that Dr. Lifchez claims is inherent in the statutory language. The bill's sponsor, Representative O'Connell, responded as follows to the governor's veto of the bill (due to what the governor saw as unconstitutional vagueness in the word "experimentation"): "I would submit that the word experiment is quite clear and does not have a vague connotation to it. In fact, the American Heritage dictionary is quite clear in defining experiments as a test made to demonstrate a known truth; to examine the validity of a hypothesis or to determine the efficacy of something previously untried." Plaintiff's Response to Motion for Summary Judgment, Exhibit A, State of Illinois 84th General Assembly, House of Representatives Debate, October 30, 1985 (Exhibit A), p.74. It is hard to imagine two more opposed definitions of "experiment" than, on the one hand,

"a test made to demonstrate a known truth," and, on the other hand, a test to determine the efficacy of something previously untried." That the bill's sponsor could offer such wildly different definitions of "experiment" as if they both meant the same thing offers little help to persons of common intelligence who want to know what the state forbids.[2] Smith v. Goguen, 415 U.S. at 574; Lanzetta v. New Jersey, 306 U.S. at 453.

It is difficult to know where along this broad spectrum of possible meanings for "experiment" to fit the medical procedures performed by Dr. Lifchez and his colleagues. These procedures can be roughly divided into three kinds: diagnostic, in vitro fertilization and related technologies, and procedures performed exclusively for the benefit of the pregnant woman. The statute's vagueness affects all three kinds of procedures, but in different ways.

DIAGNOSTIC PROCEDURES

One of the more common procedures performed by reproductive endocrinologists is amniocentesis. Amniocentesis involves withdrawing a portion of the amniotic fluid in order to test it for genetic anomalies. It is performed on women considered to be at risk for bearing children with serious defects. Plaintiff's Brief in Support of Summary Judgment at 15 n.16. The purpose of the procedure is to provide information about the developing fetus; this information is often used by women in deciding whether or not to have an abortion. Although now routinely performed, amniocentesis could be considered experimental under at least two of Dr. Lifchez' definitions: it could be classified as pure research,

---

2.) Defendant Daley claims that "experiment" and "therapeutic" have common definitions which, for some reason he does not explain, keep S 6(7) from being too vague. Defendant Daley's Brief in Support of Summary Judgment at 3. But the problem of vagueness here derives not so much from lack of a common definition of "experiment" as from the fact that there are several "common definitions," some of which oppose each other. A "test" to demonstrate something already known and a "test" to determine something as yet untried are very different kinds of tests. Vagueness can arise as much from coupling a concept with its antithesis as from a single, imprecise definition.

since there is no benefit to the fetus, the subject being experimented" on; it could also be experimental (as defined by the American Fertility Society) if the particular practitioner or clinic were doing it for the first time.

Amniocentesis illustrates well the problem of deciding at what point a procedure graduates from "experimental" to routine. Does this occur the fifth time a procedure is performed? The fiftieth? The five hundredth? The five thousandth? Shortly before the Illinois Abortion Law was first passed in 1975, amniocentesis was considered an experimental procedure by most definitions of the term. Plaintiff's Brief in Support of Summary Judgment at 16 n.16. See *National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus*; Appendix, "An Assessment of the Role of Research Involving Living Human Fetuses in Advances in Medical Science and Technology" at 15-25 through 15-45. And yet ten years later, the legislature engaged in the following colloquy:

> Didrickson: Okay then, according to this information sheet that I have in front of me, what may be affected in addition to that rubella vaccination on the aborted fetus situation would be the 'corrian' biopsy which replaces potentially amniocentesis in the future?
>
> O'Connell: This is in no way to affect amniocentesis or that process.
>
> Didrickson: So, that's a third category it would not affect?
>
> O'Connell: Well, that presupposes that amniocentesis is an experimentation on a fetus.
>
> Didrickson: And you are saying that amniocentesis in, in vitro fertilization... preservation would not be affected by your Bill?
>
> O'Connell: That's correct.

Exhibit A, p. 120. Although the non-experimental status of amniocentesis in 1985 may be established through this

reference to legislative intent, the above dialogue underscores the problem of refusing to define the key terms in § 6(7) in the context of the rapidly growing field of reproductive endocrinology. Dr. Lifchez can hardly be expected to know which of his medical activities would be illegal now if he were to look back on the quick evolution of amniocentesis from (very likely) illegal experiment in 1975 to explicitly endorsed "process" in 1985. Statutory language that embraces both of these possibilities simply "has no core" of meaning and forces people of common intelligence to guess at what the law forbids. Smith v. Goguen, 415 U.S. at 574, 578. For this reason, it is unconstitutionally vague

The court is keenly aware that, because of the meteoric growth in reproductive endocrinology, any classification of a particular procedure as either "experimental" or "routine" could easily be out-of-date within six months. The same can be said for any statistics which might support a particular classification they could be downright quaint upon publication of the next study. The court's rationale does not depend on an accurate scientific classification of amniocentesis or any other technique. If amniocentesis is no longer "experimental," then some variation of it (or some other procedure) will be. Whether or not any particular procedure is experimental or routine is not as important as the fact that many procedures begin as the former and become the latter. It is this *process* that counts, not the classification at any particular point in time.

For this reason, the court has not ventured very far from the parties' briefs, but has relied instead on their undisputed descriptions of different procedures and also on the medical authorities that are cited in support of those descriptions. That the technology in the field may outstrip the parties' briefs - and this court's opinion - does not change the fundamental progression from "experiment" to "routine" in much scientific endeavor. It also does not relieve lawmakers of the responsibility for recognizing the inevitability of this progression, and particularly describing those actions that are unlawful. Failure to do so results in the anomalous situation of amniocentesis. The very same procedure that is

explicitly endorsed today would have been illegal ten years earlier - the illegality resulting from a legislative insistence on using a protean term such as "experiment." A statute is unconstitutionally vague if the mere passage of time can transform conduct from being unlawful to lawful.

The development of chorionic villi sampling further illustrates this problem. Chorionic villi sampling involves inserting a catheter through the cervix in order to take a biopsy of the chorionic tissue, tissue surrounding the fetus. As with amniocentesis, it is a diagnostic procedure designed to give information about the developing fetus; this information is often used by a pregnant woman in deciding whether or not to have an abortion. Chorionic villi sampling differs from amniocentesis in that it yields different genetic information, it can be performed earlier in the pregnancy, and, at least at present, it is riskier to the fetus. There is also little dispute that it is experimental. Plaintiff's Brief in Support of Summary Judgment at 16. Considering all this, and especially given that chorionic villi sampling would only rarely be therapeutic to the fetus (if, for example it led to in utero surgery), it is surprising to see Representative O'Connell, in the passage quoted above, apparently exempting this procedure from the reach of § 6(7): "Didrickson: . . . according to this information sheet. . . what may be affected would be the 'corrian' biopsy which replaces potentially amniocentesis in the future? O'Connell: This is in no way to affect amniocenteses or that process." This response is both surprising and confusing, since the language of the statute, as well as either of Representative O'Connell's own definitions of experiment ("to examine the validity of a hypothesis or to determine the efficacy of something previously untried") can quite easily include chorionic villi sampling, at least at its present stage of development. Once again, even if he were to study the statute and read the legislative debates, Dr. Lifchez could not know with any certainty what conduct is being forbidden.

In Vitro Fertilization and Related Technologies

Many other procedures that Dr. Lifchez performs on his patients could fall within the ambit of § 6(7) 6(7). Among

these are in vitro fertilization and the many techniques spawned through research into in vitro fertilization. The difficulty posed by these procedures is not just whether or not they are "experimental" but whether they are "therapeutic to the fetus." The statute's failure to define this phrase contributes to its vagueness. In vitro fertilization itself involves removal of a mature ovum, placing it in a petri dish or test tube (in glass, that is, in vitro), fertilizing it, and returning the embryo to the woman's uterus where it matures into a fetus. In vitro fertilization itself is explicitly permitted by the statute. Related reproductive technologies are less certain. Embryo transfer, for example, involves removal of an embryo from one woman's uterus and placing it in the uterus of a second woman. The variations on this basic technique are considerable. A donated egg could be fertilized in vitro (with a partner's or a donor's sperm), be placed in a second woman's uterus to gestate for five days, and then be flushed out for implantation in the woman trying to get pregnant. Lori B. Andrews, Medical Genetics: A Legal Frontier at 89-90 (American Bar Foundation 1987) That this procedure is experimental is undisputed. Whether it is "therapeutic to the fetus" (actually, embryo, but legislators and courts commonly - and incorrectly - elide the two) is more complicated. Certainly, it can be argued that it is not therapeutic. Removing an embryo from one woman's uterus, where it is gestating, for implantation in another woman, may be therapeutic for the woman trying to get pregnant, but it is not necessarily therapeutic for that embryo.

Perhaps this particular technique is protected by § 6(7)'s exception for in vitro fertilization. ("Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.") But consider a slight variation on the procedure, where sterilization occurs in vivo, that is, in the uterus of the second woman. See Andrews, Medical Genetics at 163. There is ample evidence in the legislative debates that the legislature did not intend to prohibit technologies that might result in the birth of healthy children: "The in vitro fertilization process will improve but it will still remain in vitro fertilization and it is not this intent . . . the intent of this Bill

to, in any way, diminish that very valuable medical wonder ... We're not trying to, in any way, jeopardize the legitimate purposes of in vitro fertilization or amniocentesis or anything designed to enhance the birth of children by parents who otherwise could not have had those children." Exhibit A, pp. 83, 123. However, in vivo fertilization is not the same as in vitro fertilization, and the legislature chose to exempt only the latter from its ban on experimental procedures on the embryo.

It is of course a long-established rule of statutory construction that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." Matter of Cash Currency Exchange, Inc., 762 F.2d 542, 552 (7th Cir. 1985). This is part of the answer to Defendant Hartigan's claim that by not defining the key terms in § 6(7), the legislature allowed for "flexibility" in a growing field, rather than having a laundry list of exceptions that would be bound to omit something. The rest of the answer to this claim is that "flexibility" is always the defense for a statutory scheme that permits arbitrary and discriminatory enforcement of the law. Papachristou v. City of Jacksonville, 405 U.S. at 170-71. This does not change the principle that "statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." Smith v. Goguen, 415 U.S. at 575. Since in vivo fertilization and other non-in vitro variations on embryo transfer are not explicitly exempted by § 6(7), they are subject to the same objection mentioned above: they are therapeutic for the woman trying to get pregnant and unnecessarily risky for the developing embryo.

Other procedures give rise to this and similar objections. In genetic screening of in vitro embryos, one cell of an eight-cell embryo is removed for testing, while the rest are frozen. If the genetic screening on the single cell is negative, the remaining seven cells can be gestated to produce a child. Andrews, Medical Genetics at 87. This experimental proce-

dure is undisputably non-therapeutic to the embryo, and although it could fall within the statute's in vitro exception, that exception speaks to fertilization, not genetic testing. A failed implantation following in vitro fertilization genetic screening could subject Dr. Lifchez to criminal liability.

Two other in vitro fertilization-related procedures have a similarly uncertain status. Super-ovulation involves administering various hormones to induce ovulation, resulting in multiple ova. However, the hormones that are used for superovulation may have two negative effects on a woman's ability to get pregnant: lower-quality ova are produced and the uterus becomes less receptive to the embryo being implanted. In order to improve the chances of super-ovulation resulting in a pregnancy, Dr. Lifchez may need to experiment with particular elements in the procedure to achieve a more receptive uterine lining or better quality embryos. Plaintiff's Brief in Support of Summary Judgment at 25-27. Not all such attempts will be successful, and any particular one might not be therapeutic to the embryos, thus violating § 6(7).

A similar problem faces Dr. Lifchez even in performing in vitro fertilization itself. While the statute permits "the performance of in vitro fertilization," experiments designed to improve that technique have a far less certain status. Dr. Lifchez identifies two elements of in vitro fertilization that might profitably be varied in order to improve the rate of success: the shape of the vessel in which in vitro fertilization occurs, and the growth media in which the ova are fertilized. Trying different combinations of these two elements are bound to result in some failures, and hence not be therapeutic to those particular embryos. While defendants argue that it is obvious that an attempt to improve in vitro fertilization is protected, even if that attempt fails, this is apparently not the understanding of the bill's sponsor:

> Greiman: Mr. O'Connell, the Bill, I understand as it. . as it was amended, says that it is not intended to prohibit in vitro research. Is that correct? Not intended to prohibit in vitro research.

O'Connell: That Amendment was in the Senate, yes.

Greiman: It's not intended to. Now, does that mean that it might as it's drawn?

O'Connell: No, it shouldn't. It does not. We're trying to make the legislative intent in the language of the legislation to be as clear as possible that it shall not prohibit in vitro fertilization.

Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization techniques.

O'Connell: I didn't say research or techniques. In vitro. . .

Greiman: Well, what does it mean then, if it means anything?

O'Connell: The actual in vitro fertilization is not prohibited under this measure.

Exhibit A, pp. 117-118 (emphasis added). In this equivocal exchange, the bill's sponsor says first that further research is permitted ("Greiman: . . . it is not intended to prohibit in vitro research. Is that correct? O'Connell: . . . Yes."), but then changes, implying that only in vitro fertilization as it is presently performed is permitted ("Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization . . . O'Connell: I didn't say research or techniques . . . The actual in vitro fertilization is not prohibited under this measure.") The only certainty that Dr. Lifchez could take from this evidence of legislative intent is that he can attempt to improve "the actual in vitro fertilization" at his peril.

Procedures for the Pregnant Woman

A third class of procedures that Dr. Lifchez performs for his patients are those that are exclusively for the benefit of the pregnant woman. In order to discover correal carcinoma, for example, Dr. Lifchez would need to take a sample of fetal tissue for testing. Correal carcinoma originates with the

fetus and is capable of killing pregnant women. Any experimental therapy designed to detect or treat this condition is necessarily a non-therapeutic experiment upon the fetus. See Margaret S. v. Edwards, 794 F.2d 994, 999 n.12 (5th Cir. 1986); Plaintiff's Brief in Support of Summary Judgment at 11-13; Frederikson Affidavit ¶7.

Additional problems could arise with any therapy designed to help a pregnant woman. "With rare exception, any drug that exerts a systemic effect in the mother will cross the placenta to reach the embryo and fetus." Jack A. Pritchard, et al., Williams Obstetrics at 260 (17th ed. 1985). See also The Merck Manual at 1752-55 (15th ed. 1987). Thus, treatment for virtually any maternal complaint, whether it be high blood pressure, diabetes, epilepsy, or headaches, has the potential to affect the fetus. Even the use of aspirin and acetaminophen has an unknown, and potentially harmful, impact on fetal development. Quite naturally, a physician will want to know as much as possible about the effects of medication to both the pregnant woman, whose condition he is treating, and to her fetus. Such knowledge is often shrouded in uncertainty:

> The effects on the offspring cannot be predicted accurately either from the effects of lack of effects on the mother or from the effects or lack of effects on the offspring of animal species. Widespread use of a medication during pregnancy without recognized adverse effects on the fetus does not guarantee the safety of the medication. Only after many years of use was it established that diphenylhydantoin (Dilantin) and phenobarbital given to women to control epilepsy may both induce fetal malformation and impair synthesis by the fetus and newborn infant of the vitamin K-dependent coagulation factors II, VII, IX, and X. Not until deliberate, careful, extensive monitoring has failed to identify any adverse effects on the offspring not only in utero or childhood but also in the mature adult, can a drug really be declared to be safe for use in pregnancy. An especially pertinent example of delayed recognition

> of adverse effects by a drug that was widely used in obstetrics for a number of years is the induction of several abnormalities of the reproductive organs, including vaginal cancer, in young women whose mothers ingested diethylstilbestrol during pregnancy.

Williams Obstetrics at 260.

What happens when a physician wishes to try a new therapy on his pregnant patient which may have an unknown effect upon the fetus? What happens when he is virtually certain of a deleterious effect upon the fetus? See, e.g., Frederikson Affidavit ¶ 7; Merck Manual at 1752-53. Such a procedure could certainly be classified as "experimental" as to the fetus. And to the extent the physician chooses to treat primarily, or exclusively, his pregnant patient, it is doubtful that such treatment could be called "therapeutic to the fetus." By not adequately defining the terms "experiment" and "therapeutic", § 6(7) not only makes it difficult to know what conduct is forbidden, it also creates a situation where the pregnant woman and her fetus are in competition for the physician's therapy. [3]

Margaret S. Cases

The defendants point to Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) (Margaret S. I), to support their claim that the Illinois statute's failure to define "experimentation" does not render § 6(7) unconstitutionally vague. The Louisiana statute at issue in Margaret S. I provided: "No person shall experiment upon or sell a live child or unborn child unless such experimentation is therapeutic to the child

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3.) Competition between the pregnant woman and her fetus has become an important focus of state statutes regulating abortion and of Supreme Court cases striking down such statutes. See, e.g., Thornburgh v. American College of Obstetricians, 476 U.S. 747, 768-71 (1986); Colautti v. Franklin, 439 U.S. 379, 397-401 (1979). Recently, this competition has surfaced in the context of fetal protection laws in the workplace. See, e.g., International Union v. Johnson Controls, 886 F.2d 871, 908-921 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), cert. granted 58 U.S.L.W. 3614 (1990). See also Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 53 U. Chi. L. Rev. 1219 (1986).

or unborn child." Id. at 219. The Margaret S. I court rejected a claim that the statute was unconstitutionally vague. The court applied dictionary definitions of "therapeutic" ("of or relating to the treatment of disease or disorders by remedial agents") and "remedial" ("intended for a remedy or for the removal or abatement of a disease or of an evil") to arrive at a conclusion that the Louisiana legislature could not have meant to punish practitioners for unsuccessful experiments: "Since experimentation itself involves the chance of failure, the legislature could not have meant that only successful experimentation would be therapeutic or it would have said so." Id. at 219. The legislature must have only meant to forbid procedures not intended to benefit the fetus: "Regardless of whether he can calculate the odds of success, a doctor knows whether an experiment is intended to help a patient. If it is so intended, then it is therapeutic." Id. at 219-20.

The Margaret S. I court then went on to claim that the statute was no impediment to doctors performing procedures such as amniocentesis, since amniocentesis, although not therapeutic to the fetus, was not an "experiment" but a "test". The court took its definition of "test" from the dictionary ("an act or process that reveals inherent qualities") and also its definition of "experiment " a tentative procedure. . . adopted in uncertainty as to whether it will answer the desired purpose or bring about the desired result.") Id. at 221. The court concluded that "Doctors do not experiment upon people when they conduct such routine tests." Id.

This court finds the reasoning in Margaret S. I unpersuasive. Margaret S. I attempts to draw a distinction between "experiment and "test" which simply does not exist. The dictionary definitions used by the court could easily be exchanged, since an experiment could be described as "an act or process that reveals inherent qualities" and a test is sometimes "a tentative procedure. . . adopted in uncertainty as to whether it will answer the desired purpose...."[4] The

4.) The Oxford English Dictionary also does not draw the kind of clear distinctions between these terms that the Margaret S. I court sees. Its use of the word "test" to define "experiment" suggests part of the problem. The OED defines "experiment" as, variously "The action of

key distinction, as the Margaret S. I court seems to implicitly recognize, lies in the certainty and predictability of the procedure ("Doctors do not experiment upon people when they conduct such routine tests." Id. (Emphasis added)). And if certainty or predictability are the keys, a test is as likely to be uncertain as an experiment.

For example, amniocentesis, which is now routinely performed, could have been described as "a tentative procedure" ten to fifteen years ago. Chorionic villi sampling, far less frequently performed, while it "reveals inherent qualities," is still regarded by most as "a tentative procedure." Even in vitro fertilization, although explicitly permitted by the statute, would be hard-pressed to pass muster as a "test" rather than an "experiment" under the Margaret S. I definitions: with a 12-20% success rate ("In Vitro Fertilization-Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry," 53 Sterility 13 (January 1990)), in vitro could be accurately described as "a tentative procedure... adopted in uncertainty as to whether it will answer the desired purpose."

It was because of this inability to draw meaningful distinctions between "testing" and "experimentation" that the Fifth Circuit struck down a revised version of Louisiana's fetal experimentation law. Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986) (Margaret S. III). [5] (The court notes that, although the Margaret S. III court was construing a differ-

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(Footnote 4 continued) trying anything, or putting it to proof; a test, trial... An expedient or remedy to be tried.... A tentative procedure; a method, system of things, or course of action, adopted in uncertainty whether it will answer the purpose.... An action or operation undertaken in order to discover something unknown, to test a hypothesis, or establish or illustrate some known truth." The word "test" is variously defined as: "That by which the existence, quality, or genuineness of anything is or may be determined... the testing... or trial of the quality of anything; examination, trial, proof.... The action or process of examining a substance under known conditions in order to determine its identity or that of one of its constituents."

5.) It is not necessary to discuss Margaret S. II, reported as Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), since Margaret S. III supersedes it.

ent statute from the Margaret S. I court, the issue of vagueness in the failure to define "experimentation" was precisely the same for both.[6]

The Fifth Circuit found

> that physicians do not and cannot distinguish clearly between medical experiments and medical tests. As the expert witness pointed out, every medical test that is now "standard" began as an "experiment" that became standard through a gradual process of observing the results, confirming the benefits, and often modifying the technique. . . at one end [are] things that are obviously standard tests and [at] the other end things that are complete experimentation. But in the center there is a very broad area where diagnostic procedures of testing types overlap with experimentation procedures... even medical treatment can be reasonably described as both a test and an experiment. This must be true whenever the results of the treatment are observed, recorded, and introduced into the data base that one or more physicians use in seeking better therapeutic methods. The whole distinction between experimentation and testing, or between research and practice, is therefore almost meaningless in the medical context.

Id. at 999.

The Illinois statute suffers from the same problems of vagueness as the Louisiana law. The legislature's failure to define "experiment" and "therapeutic" means that physicians cannot be sure whether certain procedures - such as chorionic villi sampling or embryo transfer - are illegal. Such an uncertainty is inevitable when, on the one hand, the status of many current technologies cannot be classified as

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6.) The revised Louisiana statute provided: "No person shall experiment on an unborn child or a child born as the result of an abortion, whether the unborn child or child is alive or dead, unless the experimentation is therapeutic to the unborn child or child. Margaret S. v. Edwards, 794 F.2d at 998.

"routine," and on the other hand, procedures that could be classified as routine would have been illegal ten years earlier because they were more tentative and uncertain than today and therefore, under the reasoning of Margaret S. I, experimental. It is of course possible that the legislature really did mean to freeze medical advances in this nascent field at their present stage. What is medically myopic is not necessarily unconstitutional. A court should be hesitant to find such a legislative intent, however, when it places physicians such as Dr. Lifchez in the bizarre position of knowing that "experimentation" in amniocentesis made it legal, while "experimentation" in chorionic villi sampling may always be illegal. The fact that many current procedures fall within the twilight zone between experiment and test, coupled with a lack of consensus as to how these terms should be defined in the first place, leaves it hopelessly uncertain as to which procedures are allowed and which are forbidden.

B. THERAPEUTIC INTENT

The defendants claim that the scienter requirement in § 6(7), "Intentional violation of this section is a Class A misdemeanor, saves it from being unconstitutionally vague. It is true that a scienter requirement can do this for a statute. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) ("The Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to adequacy of notice to the complainant that his conduct is proscribed.") See also Colautti v. Franklin, 439 U.S. 379, 395 (1979)(Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.") However, a scienter requirement cannot save a statute such as § 6(7) that has no core of meaning to begin with. See Colautti at 395 n.13 ("The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain, quoting Screws v. United States, 325 U.S. 91, 101-102 (1945) (plurality opinion)). See also Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67, 87 n.98 (1960):

> Yet it is evident that, unless the Court has been fooling itself in these cases [where a scienter requirement mitigated a law's vagueness], the 'scienter' meant must be some other kind of scienter than that traditionally known to the common law - the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial. . . Such scienter would clarify nothing; a clarificatory 'scienter' must envisage not only a knowing what is done but a knowing that what is done is unlawful or, at least, so 'wrong' that it is probably unlawful.

The intent requirement applies differently to each of the three kinds of procedures that fall within the ambit of § 6(7). As already discussed in connection with the Margaret S. cases, the legality of diagnostic or screening procedures such as amniocentesis and chorionic villi sampling will depend on whether they are "tests" or "experiments." If a practitioner is unable to tell whether a procedure he is about to perform is an experiment or a test, grafting on a requirement that he intend it to be one or the other does not mitigate the vagueness of what is being forbidden. In other words, while the physician may take comfort in the fact that he is administering a test in good faith, he still does not know which tests are tests and which are experiments. To the extent that amniocentesis and chorionic villi sampling (or attempts to improve them) may be experimental, they are almost certainly illegal under § 6(7). They are designed to give information about fetal development, and often aid women in making a decision about whether or not to have an abortion. Considering in addition the risk factor of spontaneous abortion from these procedures, they can hardly be called therapeutic to the fetus, no matter the practitioner's intent.

The intent requirement is more complicated with regard to the second class of procedures that Dr. Lifchez performs, procedures such as in vitro fertilization which are designed to produce an embryo. Dr. Lifchez argues that § 6(7) requires his experiments to be successful. Unless a procedure "is

therapeutic to the fetus," he fears, he will be criminally liable. The defendants argue that the only thing inhibiting Dr. Lifchez in his efforts to improve in vitro fertilization through experimentation is his own unreasonable interpretation of § 6(7): as long as a practitioner intends his procedure to help the fetus, § 6(7) is no bar. There is support for the defendants' interpretation in the legislative debates:

> Dunn: If a fertilized egg is implanted in the womb of a woman and dies, is that process therapeutic to that particular fertilized egg?
>
> O'Connell: No.
>
> Dunn: Now, is the general process that I am talking about here. . .
>
> O'Connell: Excuse me, Representative Dunn.
>
> Dunn: Yes.
>
> O'Connell: The question that you proffered was that if the fertilization, the implantation fails, is that therapeutic to the fertilized egg?
>
> Dunn: Yes.
>
> O'Connell: Well, the best answer to that is that this is not a prohibition on therapeutic.... This is not a prohibition on in vitro fertilization. It is not a prohibition on therapeutic treatment for the benefit of the fetus.

Exhibit A, pp. 75-76. Up to this point, it would appear that merely the intent to produce a fertilized egg is enough to avoid § 6(7)'s criminal sanctions.

However, later in the debate, it is less certain that this is the case. As the Representatives discussed various medical techniques that § 6(7) might affect, it becomes clear that anything other than in vitro fertilization has a most uncertain legal status:

> O'Connell: Well, the intent is for in vitro fertilization to be permitted within the confines of this law. If it is an experimentation without the intent to result in in vitro fertilization, it would be prohibited under this law.

Exhibit A, p. 78. This statement leaves procedures such as embryo transfer and in vivo fertilization in a kind of legal limbo. In vivo fertilization involves fertilizing an ovum in a second woman's uterus through artificial insemination, and then flushing the embryo for implantation in the woman trying to get pregnant. In a broad sense, it could be argued that such an experimental procedure is intended to be therapeutic to the embryo. However, it is equally plausible to interpret the removal of a gestating embryo from one uterus to another, exposing it to the considerable risk associated with embryo transfer ("In Vitro Fertilization - Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry," 53 Sterility 13 (January 1990); Maria Bustillo et al., "Infertile Women: Preliminary Experience," 251 Journal of the American Medical Association 1171 (1984)), as evidence of therapeutic intent directed only toward the woman who wishes to bear her own child. A therapeutic intent (or at least the most therapeutic intent) toward the embryo would leave it alone to develop in the uterus in which it was fertilized.

While the defendants argue in their briefs for the broadest possible meaning of "intent" that a procedure be therapeutic to the fetus, the legislative debates suggest a far less liberal interpretation:

> O'Connell: . . . We're trying to make the legislative intent in the language of the legislation to be as clear as possible that it shall not prohibit in vitro fertilization.
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> Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization techniques.
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> O'Connell: I didn't say research or techniques. In vitro....

> Greiman: Well, what does it mean then, if it means anything?
>
> O'Connell: The actual in vitro fertilization is not prohibited under this measure.

Exhibit A, pp. 117-118. While this passage does not constitute a complete exegesis of therapeutic intent, a practitioner looking for clues as to what the legislature meant could reasonably conclude that § 6(7)'s sponsor understood his bill to permit only in vitro fertilization as it was then practiced, not further research on in vitro fertilization, not refining the techniques relating to in vitro fertilization, and certainly not an experimental procedure such as in vivo fertilization.

There is an additional inconsistency between the position taken by defendants in their briefs and the apparent intent of the legislature. At several points, defendants press a purely subjective meaning of therapeutic intent: "Therefore, if a doctor is performing an 'experiment' that is intended to help the fetus, then that action is not criminal, no matter what the final outcome of the experiment might be." Defendant Daley's Brief in Support of Summary Judgment at 4. See also Defendant Hartigan's Reply Brief in Support of Summary Judgment at 2: "But where a person's intent is ultimately to benefit the fetus, no violation of Section 6(7) has occurred." Under such a liberal description of therapeutic intent, it is difficult to imagine an experiment that a researcher could not plausibly claim was intended to ultimately benefit the fetus. Even the "Orwellian nightmare" of injecting a fetus with, say, a rubella vaccine (Exhibit A, p.116), either not knowing the effect of such an experiment or even strongly suspecting that it might be harmful, could be justified as a subjective hope to inoculate the fetus (maybe this time, with this dosage, it would work). Under defendants' subjective standard of therapeutic intent, only the most malevolently conceived experiments, such as injecting the fetus with a known harmful agent with the intent to kill it, would be forbidden. Such a subjective standard of criminal intent would be, to say the least, novel in the

criminal law. See Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law §§ 3.5 and 3.7(f) (West 2d ed. 1986). And yet this cannot be all that § 6(7) proscribes; that much is clear from the legislative debates:

> O'Connell: There has been testimony presented during the course of this Bill being considered by the General Assembly that, in fact, wholesale experimentation of fetuses has occurred in other states . . . All we're trying to address is a legitimate, realistic attempt to avoid the damaging non-life considering fetal experimentation....

Exhibit A, p. 83.

> O'Connell: I was advised that there was study or experimentation in New Jersey. There was also a study cited in the New England Journal of Medicine in which 35 pregnant women were injected with a live rubella vaccine virus to determine the effects of the virus on aborted fetuses. As for this state, I do not know of any experimentation that is going on at present, but the legislation is designed prospectively to prohibit any potential experimentation.

Exhibit A, p. 116.

> Greiman: What is research? You stick your thumb in your navel and think about it. I mean, don't you have to do things to research or no? What do you do?
>
> O'Connell: Well, you don't have to take a live fetus and inject it with some substance to determine whether or not that substance will, in fact, result in a death or disfigurement or some damage to that fetus .

Exhibit A, p. 11a.

> O'Connell: . . .The Bill is addressed to situations where a quantity of fetuses are laid out on a counter, for example, and injected with some kind of vaccine without any care as to what the well being of that fetus is, just to observe the affects that a certain vaccine might have.

> These may have been purchased by a medical facility. They may have been donated by a medical facility but. . . and nevertheless, they are live fetuses that many of us in this chamber consider to be human beings. There has been suggestions that since nothing has happened in Illinois that we know of, that we shouldn't support this Bill. I would submit that we know enough in other parts of the country, other efforts to, under the name of experimentation, take wholesale liberties with fetuses under the guise of experimentation.

Exhibit A, pp. 122-23.

Focusing on therapeutic intent does little to mitigate the inherent vagueness of § 6(7) as it applies to in vitro fertilization and related procedures.

The intent requirement is also of little help in clarifying the legality of procedures which Dr. Lifchez may perform on a pregnant woman that have an unknown effect on the fetus, procedures such as testing for correal carcinoma. This issue of transferred intent was addressed by the bill's sponsor:

> The last point that the Governor makes in his veto message is that experimentation on a mother could result in an effect. . . an indirect effect on the fetus and, therefore, result in preventing a woman, for example, as he points out in his message, suffering from cancer from being given certain medical treatments. I would submit that that is a misplaced concern. The Bill is quite specific in that we are addressing experimentation directly on the fetus. And the intent is on the fetus and not on the mother so that there cannot be, in effect, a transferred intent, if the experimentation is to be on the mother, the result to experimentation on the fetus.

Exhibit A, p. 74.

The legislators may not have intended that there be a difficulty with "transferred intent", but they did not choose language to avoid this problem. Certainly, a pregnant

woman can consent to any procedure she likes, including an experimental one. However, because of the inextricable link between her and her fetus, and because many substances will cross the placenta when administered to the woman, the "intent" to experiment on the woman could be easily interpreted as an "intent" to experiment upon the fetus. Considering the unknown effects of even many common drugs upon fetal development (Williams Obstetrics at 260), it is natural to expect that physicians will have at least a subjective intent to discover the effect of a drug upon the fetus when that drug is given to the pregnant woman. According to the defendants, even indifference to the fetus during such a procedure could be actionable: "The conduct that is prohibited is the conduct of a person not trying to help the fetus by experimentation." Defendant Daley's Brief in Support of Summary Judgment at 4. See also Defendant Hartigan's Brief in Support of Summary Judgment at 9: "The statute only makes sense when it is interpreted to prohibit only experimentation not designed to benefit the fetus." (Emphasis in original). [7]

The uncertainty that is inherent in § 6(7) derives from its failure to define the key terms "experiment" and "therapeutic". The lack of consensus as to what these words mean, coupled with the explosion of technology in the field of reproductive endocrinology, make it impossible for Dr. Lifchez to know which of the many procedures he administers may be forbidden. When there is no clear core of meaning to a statute, "intent" does not mitigate the vagueness of the language used. Because § 6(7) does not alert persons of common intelligence to what conduct is unlawful, it is unconstitutionally vague and violates the Fourteenth Amendment.

7.) It is not the province of this court to write statutes. However, the court notes that, if the Illinois legislature were to look for Ways to cure the vagueness of § 6(7) - especially the provision's failure to distinguish diagnostic from other types of procedures - models do exist. See, e.g., New Mexico Stat. Ann. § 24-9A-l(d) (1985); Rhode Island Gen. Laws 11-54-1(b) (Supp. 1989); North Dakota Cent. Code § 14-02.2-01(3) (1989); Mass. Ann. Laws ch. 112, § 12J(a) (1985).

REPRODUCTIVE PRIVACY [8]

Section 6(7) of the Illinois Abortion Law is also unconstitutional because it impermissibly restricts a woman's fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices. Various aspects of this reproductive privacy right have been articulated in a number of landmark Supreme Court cases, including Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down statute which forbid use of contraceptives on grounds that statute invaded zone of privacy surrounding marriage relationship); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Striking down statute forbidding distribution of contraceptives to unmarried persons on equal protection grounds, but observing in dicta that: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Id. at 453); Roe v. Wade, 410 U.S. 113 (1973) (establishing unrestricted right to an abortion in first trimester); and Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (striking down provisions of abortion statute requiring spousal consent and parental consent). In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a statute which forbid the sale of contraceptives to minors, forbid anyone other than pharmacists from distributing contraceptives to anyone, and forbid all advertising of contraceptives. The Court reviewed its prior privacy cases and declared that

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding

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8.) Although neither party has raised the issue, the court notes that Dr. Lifchez has standing to assert the reproductive privacy rights of his patients. See Singleton v. Wulff, 428 U.S. 106, 117-18 (1976) and Doe v. Bolton, 410 U.S. 179, 188-89 (1973).

> unconstitutional a statute prohibiting the use of contraceptives. . . and most prominently vindicated in recent years in the contexts of contraception. . . and abortion.

Id. at 685 (citations omitted).

Section 6 (7) intrudes upon this "cluster of constitutionally protected choices." Embryo transfer and chorionic villi sampling are illustrative. Both procedures are "experimental" by most definitions of that term. Both are performed directly, and intentionally, on the fetus. Neither procedure is necessarily therapeutic to the fetus. In embryo transfer, it is not therapeutic to remove the embryo from a woman's uterus after it has been fertilized and expose it to the high risk associated with trying to implant it in the infertile woman. In chorionic villi sampling, it is not therapeutic to the fetus to invade and snip off some of its surrounding tissue. Both embryo transfer and chorionic villi sampling violate any reasonable interpretation of § 6(7).

Both procedures, however, fall within a woman's zone of privacy as recognized in Roe v. Wade, Carey v. Population Services International, and their progeny. See also John A. Robertson, II The Right To Procreate and In Utero Fetal Therapy, " 3 J. Leg. Med. 333, 339 (1982). Embryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy. Chorionic villi sampling is similarly protected. The cluster of constitutional choices that includes the right to abort a fetus within the first trimester must also include the right to submit to a procedure designed to give information about that fetus which can then lead to a decision to abort. Since there is no compelling state interest sufficient to prevent a woman from terminating her pregnancy during the first trimester, Roe v. Wade, 410 U.S. at 163; Akron v. Akron Center for Reproductive Health, 462 U.S.

416, 450 (1983), there can be no such interest sufficient to intrude upon these other protected activities during the first trimester.

By encroaching upon this protected zone of privacy, § 6(7) is unconstitutional.

CONCLUSION

The court grants Dr. Lifchez' motion for summary judgment and denies the defendants' motion for summary judgment. Section 6(7) of the Illinois Abortion Law is unconstitutional and the defendants are permanently enjoined from enforcing it.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: APR 26, 1990

APPENDIX I

December 8, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	December 8, 1989
	)	9:00 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

For the ACLU: NEAL, GERBER, EISENBERG & LURIE,
208 South LaSalle Street
Chicago, Illinois 60604

Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street, Room 1928
Chicago, Illinois 60604 (312) 435-6891

THE CLERK: 82 C 4234, Smith versus Hartigan (LIFCHEZ v. HARTIGAN) on a status, third call.

COUNSEL FOR THE ACLU: Good morning, Your Honor. I'm very embarrassed for the situation here. I was told by an attorney in my office the name of the case,

and I believe they got the name wrong.

I'm here on behalf of the ACLU. I'm from Neal, Gerber, Eisenberg & Lurie, and I'm here in place of Fran Krasnow. I believe that this may be the case. It's an in vitro fertiliza-
tion-

THE COURT: Right.

COUNSEL FOR THE ACLU: I'm terribly sorry for the mix up.

THE COURT: All right.

COUNSEL FOR THE ACLU: The last time Miss Krasnow was here there had been an amendatory veto by Governor Thompson on the amendment to the statute. The house overrode the veto and at that time we were waiting to see if the senate would override it. The senate has not overrode the veto, so the statute remains the same, and our briefs are now current, which means at your convenience the Court can rule on the cross motions.

THE COURT: All right., Then I will consider it as of today. I'm going to lift the stay.

COUNSEL FOR THE ACLU: Okay.

THE COURT: Because I've stayed ruling on it. I'll lift the stay as of today's date and put it in my stack of briefs, and it will be ruled on in due course.

COUNSEL FOR THE ACLU: Thank you, Your Honor.

THE COURT: All right. Thank you.

APPENDIX K

September 29, 1989

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held and continued to December 8, 1989 at 9:00 a.m.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	September 29, 1989
	)	9:00 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

For the Plaintiff: NEAL, GERBER, EISENBERG
& LURIE, by
MS. FRANCES H. KRASNOW
208 South LaSalle Street
Chicago, Illinois 60604

Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street, Room 1928
Chicago, Illinois 60604 (312) 435-6891

THE CLERK: 82 C 4324, Smith versus Hartigan on a status, second call.

MS. KRASNOW: Good morning, Your Honor. Frances Krasnow on behalf of the plaintiffs.

Your Honor, when we were before the Court last time I believe that Miss Connell reported to the Court that there was a bill that was pending that was likely to be passed and we were waiting to see whether the governor would sign it.

THE COURT: Right.

MS. KRASNOW: Governor Thompson did issue an amendatory veto. He vetoed the portion of the bill that would prohibit the use of fetal tissue resulting from an abortion for any research purposes, which means that we are now going to wait and see what happens on the possibility of an override of the veto.

THE COURT: How many days do we have for that?

MS. KRASNOW: Well, there's apparently one week in October, Your Honor, and one week in November. And in discussing this with other counsel we think perhaps a status in December would make sense. At that point we would be able to perhaps narrow the issues that are presented in the cross motions for summary judgment and this Court would have —

THE COURT: Okay. Then let's set it for December 8th at 9:00.

MS KRASNOW: 9:00? Thank you, Your Honor.

THE COURT: All right.

APPENDIX M

July 25, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held and continued to September 29, 1989 at 9:00 a.m.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	July 25, 1989
	)	9:30 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

For the Plaintiff: MS. COLLEEN K. CONNELL,
Director and Counsel,
Reproductive Rights
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Foundation of ACLU
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For Neil F. Hartigan: MS. PAULA J. GIROUX
Assistant Attorney General
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For Richard M. Daley: MR. HAROLD E. McKEE III,
Assistant States Attorney
500 Daley Center
Chicago, Illinois 60602

Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street
Room 1928
Chicago, Illinois 60604
(312) 435-6891

THE CLERK: 82 C 4324, Smith versus Hartigan(LIFCHEZ v. HARTIGAN) on a status.

MS. CONNELL: Good morning, Your Honor. Colleen Connell for plaintiffs.

MS. GIROUX: Good morning, Your Honor. Paula Giroux for defendant Hartigan.

MR. MC KEE: Good morning, Your Honor. Harold McKee for defendant Daley.

THE COURT: All right. Since the Supreme Court ruled, you know, we were in a position to address this matter. I had my clerk call the parties to see where things stood in light of the ruling, if that would change things, do I still need to rule on it,, and there was some indication that we might need to wait for some additional legis - - I wanted to find out the status of that and see where the parties were because I can continue the stay if necessary, but I'm ready to get this done. We could have it done in the next week.

MS. CONNELL: Your Honor, if I can suggest a short stay, maybe continuing the stay for another 609 days. As I told your clerk, the Illinois General Assembly did enact a bill which amended Section 6(7), which is

the section at issue here. It's house bill 2693. I have unfortunately not a final copy. It's just a copy with all the different amendments. The enrolled version isn't ready from Springfield yet.

The lobbyist who is employed by the ACLU says there has been a substantial amount of opposition to parts of the bill by the medical profession and that several professional societies have contacted the governor's office about the possibility of an amendatory veto on this. how credible that is, how likely that is I'm really not in a position to judge. But the bill would change the statute at issue, although it does preserve the primary parts that the parties briefed, namely, the prohibition on experimentation unless such experimentation was therapeutic to the fetus.

So from my vantage point it appears that continuing the stay for another 60 days to see what action, if any, the governor takes on that might be the most efficacious use of all of our time.

THE COURT: All agree or any objection to the Court continuing it?

APPENDIX O

June 14, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN

This case is stayed pending the United States Supreme Court's ruling in *Webster v. Reproductive Health Services*, 88-605.